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PP

v.

HISLA SULAI

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 41-14-2007-II]
28 MAY 2007

C ***CRIMINAL PROCEDURE:*** *Sentence - Adequacy of sentence - Offence of theft under s. 379 of Penal Code - Wide discretion to court to impose sentence - Theft of electrical copper wires worth RM400 - Sentence of fine of RM3,000 and in default one month imprisonment - Whether satisfactory - Principles of sentencing - Penal Code ss. 378, 379*

D ***CRIMINAL PROCEDURE:*** *Appeal - Right of appeal by prosecution - Unfettered right but not to be exercised arbitrarily - Prosecution to truly weigh need for appeal in cases relating to first offenders and where principles of law are well settled*

E The respondent was charged with an offence of theft of electrical copper wires worth RM400 under s. 379 of the Penal Code. The learned magistrate had sentenced the respondent to a fine of RM3,000 and in default one month imprisonment. The Public Prosecutor appealed claiming that the learned magistrate had failed to (a) take into consideration the seriousness of the offence committed by the respondent F (b) consider that the criminal law is publicly enforced not only for the purpose of punishing the offender but also to deter others from committing the same (c) take into consideration the rampancy of the offence committed by the respondent (d) take into account s. 56 of the Evidence Act 1950; and (e) appreciate the current sentencing trend for G the offence of theft.

Held (dismissing the appeal):

(1) Under s. 379, Parliament has given wide discretion to the court to impose minimum sentence such as a fine or nominal fine to more H severe punishments, like imprisonment and whipping. (para 6)

(2) The facts of the case and the grounds of judgment by the learned magistrate were sufficiently satisfactory and did not warrant an appeal as principles of sentencing are well settled. (para 6)

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(3) The right to appeal by the prosecution is an unfettered right within the scope of the relevant Acts. However, such rights in practice are not to be exercised arbitrarily for there is a greater duty for the prosecution to consider well settled principles of law in relation to the success of the appeal. There is also a rudimentary requirement to ensure that the court's decision is respected and unnecessary appeals are not made to absorb judicial time. It is for the prosecution to truly weigh the need for appeal in cases relating to first offenders and where the principles of law are well settled. (paras 8 & 12)

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***
Leken Gerik (M) v. PP [2007] 8 CLJ 158 HC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v.Teh Ah Cheng [1976] 1 LNS 116 HC ***(refd)***
PP v. Wong Chak Heng [1985] 1 CLJ 375; [1985] CLJ (Rep) 717 HC ***(refd)***
R v. Turner [1970] 2 QB 321 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 56
Penal Code, ss. 378, 379

For the prosecution - Siti Rafidah Zainuddin; DPP
For the respondent - In person

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appeal by the Public Prosecutor against inadequacy of sentence. The respondent was present but unrepresented.

[2] The respondent was charged with an offence of theft under s. 379 of the Penal Code which reads as follows:

> Whoever commits theft shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both, and for a second or subsequent offence shall be punished with imprisonment and shall also be liable to fine or to whipping.

[3] The charge reads as follows:

> Bahawa kamu bersama-sama pada 21.02.2006 diantara jam 5.00 petang hingga 6.00 petang bertempat di kawasan Kampong Selangking, di Daerah Simunjan Bahagian Samarahan di Negeri Sarawak telah mencuri dawai tembaga lebih kurang 15 meter panjang yang dipasang pada 4 batang tiang letrik Sesco, yang dianggarkan bernilai RM400.00. Oleh yang sedemikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 379 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun yang sama.

[4] The grounds of the judgment of the learned magistrate read as follows:

> Background of the case
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> There were two accused in this case. Both of them were brought before me at Simunjan Court. The learned deputy public prosecutor being dissatisfied with my ruling appealed against the same and I shall now give my grounds for sentencing on that day.
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> Factors taken into consideration by the Court
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> In passing the sentence, I had in my mind that this case was happened in rural area ie Simunjan District. The nature of the offence is no doubt rampant in Kuching, state of capital of Sarawak and thus warrants deterrent sentence. But in small area like Simunjan, I hardly encounter this kind of cases. Therefore, it is my view that I should give the accused such benefit of the criminal rate, if I can call that as benefit.
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> Having said that, it is my view that this kind of crime should be discouraged by passing deterrent sentence according to the circumstances of the case. In this case, the two accused were found guilty by way of their plea. This is their first offence and the sentence must somehow reflect two things, punishment and reformation. Lawton J recognized the "classical principles of sentencing" in *Reg v. J.H. Sargeant* [1975] 60 Cr. App. R. 74 and at p. 77 his Lordship summed up the principles in four words: retribution, deterrence, prevention and rehabilitation.
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> Lest being accused of oversight, I at all times did not turn down the plea of mitigation by the accused. I also considered the plea of guilty by him and on the day of the sentencing, I am fully aware of the principle of which the court would normally give discount in cases of conviction recorded by pleading guilty. The discount in sentencing of between one-quarter to one-third as propounded by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1988] 1 MLJ 167.

I had balanced between the public interest and also the interest of the accused, took into consideration of the nature of the offence, the criminal record of the accused, it is my judgment that the amount of fine of RM3,000 in default of one month imprisonment imposed would have crush effect on the accused and should not be considered as lenient since the income of average people in Simunjan area are far less than those in Kuching. For kampung folks, such amount would make them think twice before they could lift their finger on scrap metal belonging to somebody else. I believed the above sentence that I pronounced are just and fit in this case.

I so order.

[5] In this case the respondent was sentenced to a fine of RM3,000 and in default one month imprisonment. The appellant in the petition of appeal says *inter alia* that they are dissatisfied and are of the opinion that the learned magistrate had failed to (a) take into consideration the seriousness of the offence committed by the respondent (b) consider that the criminal law is publicly enforced for its purpose is not only to punish the offender but also to deter others from committing the same (c) take into consideration the rampancy of the offence committed by the respondent even though no statistic had been submitted by the prosecuting officer (d) take into account s. 56 of the Evidence Act 1950 (e) appreciate the current sentencing trend for the offence of theft. The appellant, further, *inter alia* submits as follows: (i) the particulars of the case revealed that the respondents were stealing about 15 meters copper wire along Kg. Selengking road, Simunjan which belong to SESCO, and is of an estimated value of RM400. (ii) The fact that the police had seized 3 spanners, a player, 12 nos. of cut copper wires and an axe in relation to this case, show that the crime committed by the respondent was pre-meditated. (iii) In *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186, Abdool Cadeer J *inter alia* held:

In sentencing generally the public interest must necessarily be one of the prime considerations, and more particularly in offences involving the unlawful use or possession of firearms the public interest should never be relegated to the background and must of necessity assume the foremost importance. Of the several concepts relevant to sentencing, it is my considered view that deterrence and prevention assume positions in the forefront in relation to offences of this nature. Lawton L.J. in his delightful analysis of the classic principles of sentencing and general aspects of punishment in the English Court of Appeal in *Reg v. JH Sargeant* [1975] 60 Cr App R 74, 77, 78 observed (at page 77): "Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences".

This kind of offence is very serious in the sense that it would cause interruption of electrical supply and thereafter cause public inconveniences. A deterrent sentence should be imposed to prevent the would-be offender from committing the same nature of offence. In *Public Prosecutor v. Wong Chak Heng* [1985] 1 MLJ 457, Chan J held:

> In ordinary circumstances, petty theft would not have attracted any immediate sentence of imprisonment. But when one considers the extent to which the stealing of motorcar parts and accessories is rife at the present day, then the Court inevitably must view such an offence as a very serious crime indeed. Let it be repeated: it may be necessary to set out and stress the reasons why at the present time offences of this kind should be dealt with severely and usually by a custodial sentence. On all sides members of the public, if they have not lost their cassette players or radios or even their cars, hear that their friends and relatives have. The public are entitled to be protected against such offenders. In the opinion of this court, they are not likely to be protected if lenient sentences are passed. Offenders are not likely to be discouraged by sentences which do not involve loss of liberty. If an immediate prison sentence is necessary, as I believe to be the case here, then it should be consistent with the duty to protect the interests of the public and to punish and deter the criminal. To use the words of Lawton L.J. in *Reg v. Davies* [1978] 67 Cr App R 207, 210 "the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct. In the instant case, Wong is a first offender. The sentencing court must realise, that when one speaks of deterrence that there are two aspects of deterrence. This is how it was put by Lawton L.J. in *Reg v. Sargeant* [1974] 60 Cr App R 74, 77: "There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders."

(iv) the learned magistrate failed to take into consideration s. 56 of the Evidence Act 1950, which states "No fact of which the court will take judicial notice need be proved." The theft involving metal parts, copper wire and cables were very rampant particularly in Sarawak. The government by means of electronic media has also made a campaign to improve public awareness about the serious consequences when metals like manhole or electrical wire or cable are stolen. This offence usually would cause public inconvenience. As such even though there was no statistic tendered by prosecution, the court is still entitled to take judicial notice, pursuant to s. 56 of Evidence Acts 1950 and rely on the case of *Lee Chow Meng v. Public Prosecutor* [1976] 1 MLJ 287.

[6] I have considered the unilateral argument in detail and find it lacks merit and substance for appellate interference. My reasons are as follows:

(a) Section 378 of the Penal Code defines 'theft' as follows:

> Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Though s. 378 of Penal Code defines theft, it does not *per se* distinguish theft and petty theft. However, it is clear that parliament had this distinction clearly in mind when it enacted the sentencing provision for theft, pursuant to s. 379 of the Penal Code.

(b) Under s. 379, Parliament has given wide discretion to the court to impose minimum sentence such as a fine or nominal fine to more severe punishments, like imprisonment and whipping. When the appeal came before me for hearing on 7 May 2007 after reading the grounds of the learned magistrate I was in the first instance perplexed with the prosecution's decision to appeal when the facts of the case and the grounds of the judgment by the learned magistrate were sufficiently satisfactory and did not warrant an appeal as principles of sentencing are well settled. These facts have been emphasised in many cases and I have dealt with principles of sentencing in detail in *Leken @ Delem Ak Gerik (M) v. Public Prosecutor* [2007] 8 CLJ 158, which I do not wish to repeat in this instance, except to highlight the decision of Hashim Yeop A Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102, where His Lordship observed:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
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> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139 stated that:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

[7] On the date of hearing 7 May 2007, I specifically asked the learned deputy public prosecutor (DPP) to guide the court on what facts the minimum sentence should be imposed on in case of theft and whether the prosecution is seeking severe punishment such as imprisonment and whipping for any form of theft and thereby making the provision for fine in s. 379 otiose. There was no response.

[8] In my view, the right to appeal by the prosecution is an unfettered right within the scope of the relevant Acts. However, such rights in practice are not to be exercised arbitrarily for there is a greater duty for the prosecution to consider well settled principles of law in relation to the success of the appeal. There is also a rudimentary requirement to ensure that the court's decision is respected and unnecessary appeals are not made to absorb judicial time. In fact, the law in various jurisdictions has developed in leaps and bounds to ensure court's time is much saved and the prosecution is less burdened, with avoidable prosecution. One such area is in plea bargaining. It will be an opportune moment to reproduce parts of the preface of the learned author Dr. Suman Rai appearing in his latest edition of *"Law Relating To Plea Bargaining"* where he says *inter alia* that:

Grievances have been vented in public that the disposal of criminal trials in the Courts of the Magistrates and District and Session Judges takes considerable time. It is said that the criminal trials do not commence for as long a period as three to four years after the accused was remitted to judicial custody. In the meantime the accused languish in jails. It was further represented that the conditions prevailing in the jails are appalling and the accused are obliged to live in sub-human conditions mixed up with hard-core criminals. It is said that in several cases the time spent by the accused in jails before the commencement of trials exceeds the maximum punishment which can be awarded to them even if they are found guilty of offences charged against them. ... The facts ... came to the notice of the Supreme Court in a number of cases, most important among which is that of *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360: 1979 (3) SCR 169: 1980 (1) SCC 81: 1979 Cr LJ 1036: 1980 SCC (Cr) 23 ... The Supreme Court passed a number of Orders in this connection. It was brought to the notice of the Supreme Court that an alarmingly large number of men and women ... children including .. are behind prison bars for years awaiting trials in Courts of law. In the above case it was observed by the Supreme Court that:

> ... the offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two and yet these unfortunate forgotten specimen of humanity are in jail, deprived of their freedom for periods ranging from three to ten years without even as much as their trial having commenced.

The Supreme Court noticed that several under-trial prisoners have been in jails for as many as five, seven or nine years and a few of them even more than ten years without their trial having begun. The Supreme Court lamented:

> What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the Courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians", are forced into long cellular servitude for little offences because the bail procedure is beyond their meager means and trials don't commence and, even if they do, they never conclude.

The Supreme Court had further found:

> There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the under-trial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an accused should not even commence for a long

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> number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. ...

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The Supreme Court had recommended introduction of plea-bargaining in its decisions and the legislature has acted upon the advice of the Supreme Court and the recommendations of the various Committees for Criminal Justice Reforms in India eg, 142nd and 154th Report of Law C Commission, Malimath Committee Report of 2003 and the Recommendations of the Parliamentary Standing Committee on Home Affairs in 2005 and passed the Criminal Procedure Amendment Bill, 2006 which has introduced the much needed concept of plea-bargaining into the Indian Scenario.

D **[9]** Plea bargaining is a process where the prosecution and the defence makes an attempt to achieve a compromise to allow the accused to plead guilty on certain conditions. For example, if the accused is charged for more than one offence, the prosecution may agree to proceed with one offence only provided the accused agrees to plead E guilty to that wrongdoing. Our courts do not entertain the prosecution and the defence to discuss plea bargaining openly before it or does not generally entertain any suggestion for sentence to be agreed before the plea is taken, notwithstanding the prosecution has no objection. However, the English Courts have been more flexible and this trait F enables matters to be disposed of at the earliest opportunity saving the courts' time. In *R v. Turner* [1970] 2 QB 321 the Court of Appeal set out some guidelines for plea bargaining. The court stated:

> 1. Counsel must be completely free to do what is his duty, namely to give the accused the best advice that he can and if need be G advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel of course will emphasise that the accused must not plead guilty unless he has committed the acts constituted in the offences charged.
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> 2. The accused, having considered counsels advice, must have a complete freedom of choice whether to plead guilty or not guilty.
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> 3. There must be freedom of access between counsel and judge. Any discussion however, which takes place must be between the I judge and both Counsel for the defence and counsel for the prosecution. If a solicitor representing the accused is in the court he should be allowed to attend the discussion if he so desires. This freedom of access is important because there may be

matters calling for communication or discussion, which are of such a nature that counsel cannot in the interest of his client mention them in open court. Purely by way of example, counsel for the defence may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering from cancer from which he is and should remain ignorant. Again counsel on both sides may wish to discuss with the judge whether it would be proper in a particular case, for prosecution to accept a plea to a lesser offence. It is of course imperative that so far as possible justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary, and the judge must be careful only to treat such communications as private where, in fairness to the accused personal, this is necessary.

4. The judge should, subject to the one exception referred to hereafter, never indicated the sentence which he is minded to impose. A statement that on a plea of guilty would impose one sentence but on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, in the experience of the court happen rarely. What on occasions do appear to happen however is that a judge will tell counsel that, having read the dispositions and the antecedents, he can safely say that on a plea of guilty he will for instance, make a probation order, something which may be helpful to counsel in advising the accused.

   The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence would result, so that again he may feel under pressure. This accordingly must never be done.

   The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence. Finally where any such discussion or sentence has taken place between judge and counsel, counsel for the defendant should disclose this to the accused and inform him of what took place.

[10] I take the view that our courts should readily entertain 'plea bargaining', subject to the guidelines set out in *R v. Turner* as it will allow matters to be disposed of expeditiously and the appellate courts will not be unnecessarily burdened with appeals. However, there are at least two or three reported decisions where the judges as a passing

A remark have made some comments as to validity of plea bargaining in common law jurisdiction. The cases are as follows: (i) *New Tuck Shen v. Public Prosecutor* [1982] CLJ 38; [1982] CLJ (Rep) 606 (ii) *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597. It is common knowledge that the concept of adjective law is always one
B which develops from time to time according to the needs of the society and in Malaysia the development in respect of substantive rights must in almost all cases be based on statutes that is not the case for procedural law or its hybrid. When it relates to procedural law or law adjective in nature, it is always in the hands of the court to set proper
C guidelines within the spirit and intent of the various provisions of the Courts of Judicature Act 1964. Especially, when it involves criminal proceeding it is sufficient to obtain the consent and cognisance of the Attorney General who stands as the prosecutor as well as Supreme Legal Adviser to the government. Thus, to say that all adjective laws relating to criminal procedure must obtain statutory sanction is an
D unreasonable fetter placed by the relevant institutions which is responsible for the administration of justice. Any judgment which stands to be an impediment for proper administration of justice must be revisited more so where the liberty of the subject is on trial. To the credit of our courts and attorney general's chambers, plea bargaining in a limited
E sense is in vogue. In fact practitioners will attest that the 'plea bargaining' concept to same extent is in practice here without statutory or judicial sanction. For this the prosecution must be commended as they have by and large in a limited sense reduced the backlog in criminal cases but they need to do more in line with the development in other
F jurisdiction.

[11] The above preface will throw much light on the need for positive steps to be taken by the prosecution to ensure efficient administration of criminal justice as opposed to clogging the criminal justice system with avoidable prosecution and unnecessary appeals as clearly
G demonstrated on the facts of this case. This is so for the simple reason that the very principle not to disturb the discretion of the adjudicator in sentencing is grounded on the common law where in a jury trial the prosecution can hardly appeal against the sentence. The decision of the jury is almost final. Trial by jury has long been abolished here in toto.
H The adjudicator here tries both facts and law. The notion that the decision of the adjudicator can only be disturbed in limited circumstance is now well entrenched and the appellant in this case must not be reminded again and again by decisions of courts. This is very apt in this instance since the appellant does not substantiate proper grounds of
I appeal and attempts here to waste much of judicial time, where time is seen to be a scarcity and large numbers of prisoners are awaiting trial for years.

[12] For the prosecution, a decision to appeal has minimum paper work as an appeal is brought by the prosecution by just filing the notice of appeal in the prescribed form. This is not the case for the courts as the burden to prepare the appeal record and file and serve on all relevant parties the record of appeal is on the court, and the judge is saddled with the responsibility of hearing the appeal and giving written grounds of judgment. The administrative as well as the judicious strain entrusted on the courts is a heavy one. It is for the prosecution to truly weigh the need for appeal in cases relating first offenders and where the principles of law are well settled. This would help the courts to use their resources and time productively in clearing backlog and providing justice to those who are languishing in prison as there is scarcity of manpower and resources. The prosecution must not be even seen to clog the criminal administration of justice by filing avoidable appeals. Sadly, the facts of this case reflects, so. The submission of the learned DPP does not warrant appellate interference in respect of the sentence, when the magistrate says it was theft of scrap metal only valued at 400 ringgit that too by the prosecution. In consequence, I dismiss the appeal. I hereby order so.